FILE COPY

APR 24 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1425

BROADRIVER, INCORPORATED,

Petitioner,

—v.—

CITY OF STAMFORD, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

JULIUS B. KURIANSKY
25 Bank Street
Stamford, Connecticut 06901
Attorney for Petitioner

BLEED THROUGH POOR COPY

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	15
Appendix A—Constitutional Provisions, Statutes and Regulations Cited	17
Appendix B—Judgment and Proceedings Below	23

Table of Authorities Cited

Cases:

Cincinnati v. Vester (CA 6), 33 F.2d 342, affd. 281 U.S. 439	14
Cole v. La Grange, 113 U.S. 1	14
Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134, 138	7
Henry Ford & Son v. Little Falls Fibre Co., 280 U.S. 369	14
Hobson v. Hobsen, 269 F. Supp. 401, 497	11

PAGE

Madisonville Traction Co. v. St. Bernard Min. Co., 196 U.S. 239 14
McLaughlin v. Florida, 379 U.S. 184, 190 8
Missouri Pacific Railway Company v. Nebraska, 164 U.S. 403 9

North Carolina Pub. Serv. Co. v. Southern Power Co. (CA 4), 282 F. 837, cert. dismd. 263 U.S. 508 14
Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 ..... 7, 11

United States v. Central Eureka Mining Co., 357 U.S. 155 14
Utah Power and Light Co. v. United States, 253 U.S. 389 14

Wilkinson v. Leland, 2 Pet. (U.S.) 627 14

Statutes:

Connecticut General Statutes, Sec. 8-129 ..... 2, 3, 12, 13

Constitutional Provisions 2, 3, 5, 7, 8, 12, 14

BLEED THROUGH POOR COPY

In the

Supreme Court of the United States

October Term, 1969

No. .....

Broadriver, Incorporated,

Petitioner,

—v.—

City of Stamford, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Petitioner Broadriver, Incorporated prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered on December 3, 1969.

Opinions Below

The opinion of the Supreme Court of the State of Connecticut is reported at 158 Conn. 522, —— Atl.2d ——.

Jurisdiction

The Connecticut Supreme Court entered judgment on December 3, 1969, and the decision was announced on December 23, 1969. Petitioner's motion to reargue was denied on January 15, 1970.

The jurisdiction of this Court is conferred by 28 U.S.C. Sec. 1257(3).

Questions Presented

1. A City and an Urban Redevelopment Commission cause a vast area of a city to be condemned and give preference to one individual to purchase and develop the properties in this area, to the exclusion of others, including owners of parcels in the area who are willing to develop their parcels in accordance with renewal standards. Is it an unlawful taking in violation of the equal protection and due process clause of the Fourteenth Amendment and a public taking for a private purpose, to grant and continue giving this preference to this one individual pursuant to an agreement between the Urban Redevelopment Commission and this individual which is patently illusory and void, as a result of which this individual is not bound by any legally enforceable obligation to the City or the Urban Redevelopment Commission, where this preference is continued, to the exclusion of others, for an uninterrupted period of six and one-half years, during the entire time of which this individual neither purchases nor agrees to purchase any of the property in the redevelopment area?

2. Where under Connecticut General Statutes § 8-129, petitioner's property was taken and title transferred to respondents, despite petitioner's present suit to prevent the taking as one for a private rather than a public purpose, and as violative of the due process and equal protection clause of the Fourteenth Amendment, was this taking a violation thereof?

Constitutional Provisions, Statutes and Regulations Involved

Section 8-129, Connecticut General Statutes Revision of 1958 is set out in the Appendix, *infra,* p. 17.

Section 8-137, Connecticut General Statutes Revision of 1958 is set out in the Appendix, *infra,* p. 20.

Fourteenth Amendment, United States Constitution is set out in the Appendix, p. 17.

Statement of the Case

The plaintiff is the owner of a tract of land located on the southeast corner of Broad and River Streets in Stamford, Connecticut. On July 14, 1966, acting pursuant to § 8-129 of the Connecticut General Statutes, the defendant Urban Redevelopment Commission, a public agency of the City of Stamford, caused to be served upon the plaintiff and filed with the defendant Clerk of the Superior Court at Stamford a "Notice of Taking" and a "Statement of Compensation" (Lis Pendens) covering the plaintiff's property. More than six months later, on February 1, 1967, the Clerk issued a Certificate of Taking, which Certificate was recorded in the Stamford Town Clerk's Office, and, since that date, the defendant City claims to be the fee simple owner of the plaintiff's premises.

A plan for the redevelopment of a portion of the City of Stamford, known as the "Southeast Quadrant Redevelopment Plan Extended," the text of which is in evidence as Exhibit K, had been adopted by the Board of Representatives of the City of Stamford in March, 1963.

On January 27, 1960, the defendant Urban Redevelopment Commission entered into an "Agreement" with Seon Pierre Bonan and The F. D. Rich Co., Incorporated, the so-called preselected sponsors of the redevelopment project. The "Agreement" contemplated that a disposition contract would be entered into between the defendant Urban Redevelopment Commission and the preselected sponsors, but, as of the date of trial, no such contract had been executed by the parties.

Mrs. Dwight Marshall is, and for approximately five years prior to the trial had been Chairman of the defendant Commission. Dr. Arthur Koffler is President of the plaintiff corporation. In May of 1966, Dr. Koffler and Mrs. Marshall arranged a conference at the office of the Urban Redevelopment Commission to discuss the proposed condemnation of the plaintiff's land. Present at this meeting, in addition to Mrs. Marshall and Dr. Koffler, were George A. McCulloch, Redevelopment Co-ordinator and Director for the defendant Commission; Eugene D. Jones, Project Manager for Frederick R. Harris Associates, the Co-ordinating Engineers retained by the defendant Commission; and Attorney Sydney C. Kweskin, representing the plaintiff. Mrs. Marshall advised Dr. Koffler that the Commission would require for the redevelopment plan only so much of the plaintiff's property as was necessary to widen River Street and that it would be willing to relinquish the balance of the property from development by the sponsors, provided that the preselected sponsors would give their consent. Mrs. Marshall also advised Dr. Koffler that if it were agreeable with the preselected sponsors, the Commission would be willing to permit the plaintiff to develop its property together with the abutting Urbanowicz parcel

BLEED THROUGH POOR COPY

as a joint venture with the sponsors. Mr. McCulloch set up an appointment with the preselected sponsors on behalf of Dr. Koffler. Subsequently, Dr. Koffler conferred with a representative of the preselected sponsors, Robert Rich, who refused to relinquish the sponsors' claimed interest in any portion of the plaintiff's property or the Urbanowics parcel.

Shortly after the institution of the within action the plaintiff sought a temporary injunction to restrain the defendants from acquiring its land and buildings. The restraining order was denied. The plaintiff's request for a permanent injunction and claim for a declaratory judgment were decided in favor of the defendants, and the within appeal ensued.

Reasons for Granting the Writ

A. Certiorari should be granted to decide whether the taking of petitioner's property is in violation of the equal protection and due process clause of the Fourteenth Amendment, and a public taking for a private purpose and thus violates the due process clause of the Fourteenth Amendment.

This case presents vital constitutional questions not heretofore determined by this court, and important questions of broad practical significance.

On June 30, 1969, there were 2,583 Urban Renewal Projects approved for Federal Assistance throughout the United States under Title 1 of the Housing Act of 1949, as amended; and Federal grants for Urban Renewal Projects totalled the immense sum of $7,859,049,000.00. It is therefore evident that Urban Renewal Projects have a vast and incalculable impact on society, both in the governmental and private sector. See Urban Renewal Directory, June 30, 1969, U. S. Department of Housing and Urban

Development, Table 1. The questions raised by the actions of urban redevelopment commissions thus affect the lives and property of a substantial segment of our population in a most drastic, fundamental and final manner.

On January 27, 1960, an agreement was entered into between the Urban Redevelopment Commission of the City of Stamford, Connecticut, on the one hand, and F. D. Rich Co., Incorporated, and Seon Pierre Bonan, on the other, referred to as the redeveloper. This agreement was patently illusory and void. Six and one-half years later, specifically on July 14, 1966, the Commission served a notice of taking upon petitioner, for the purpose of condemning its land. The Commission asserted that at that time, and at all times prior thereto, it was acting pursuant to the aforesaid agreement, which the Commission stated granted to the redeveloper a right of first refusal. Although this illusory and void agreement indicated that a subsequent contract would be entered into between the Commission and the redeveloper, under which the latter would actually agree to purchase land in the area, no such contract had been entered into between them at the time of taking of petitioner's land. In fact, during this entire period of six and one-half years the redeveloper neither purchased nor contracted to purchase one inch of land in the vast redevelopment area. Yet, after this very extended period of time, petitioner was not permitted to redevelop its land, although it was willing to do so in accordance with renewal standards, and petitioner's land was condemned, the Commission asserting that this so-called redeveloper had a right of first refusal.

It has been held that an Urban Redevelopment Commission may use private enterprise for redevelopment of an

area. This is, however, no authority for the proposition that every type of relationship may be properly entered into and pursued between a redevelopment commission and a redeveloper. Certainly a redevelopment commission may not deal with a redeveloper in such a manner as to deprive others who own land in the redevelopment area of equal protection or due process under the Fourteenth Amendment of the Constitution of the United States.

The United States Court of Appeals, Second Circuit, in dealing with the actions of a redevelopment commission in *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F.2d 920, considered the practice of a commission relating to relocation of displacees. Although the commission admittedly had authority to displace and relocate inhabitants in the area in a proper and authorized manner, the court held that it could be found that the commission had in fact exercised this authority with respect to petitioning displacees, in a manner that was violative of the equal protection guarantees of the United States Constitution.

So, in the instant case, where the Commission admittedly had authority to deal with a redeveloper in a proper and authorized manner, to the exclusion of a landowner, the Commission in fact exercised this authority, with respect to a petitioning landowner, in a manner that was violative of the equal protection guarantees of the United States Constitution.

It is established that the Equal Protection Clause of the United States Constitution is satisfied only when a classification rests ". . . upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed . . ." *Colon* v. *Tompkins*

Square Neighbors, Inc., 294 F. Supp. 134, 138, citing *McLaughlin* v. *Florida*, 379 U.S. 184, 190.

In the instant case there was no such reasonable or just basis for permitting this so-called redeveloper to have a right of first refusal with respect to petitioner's land, which petitioner was prepared to develop in accordance with renewal standards. Under these circumstances, equal protection required that petitioner be given the opportunity to develop its own land. The so-called redeveloper, having executed only an illusory and void agreement, had not been legally obligated to perform for a period of six and one-half years, during all of which time the Commission had given the redeveloper the preferential right of first refusal with respect to land in the redevelopment area; and during all of this time the redeveloper had neither contracted to purchase, nor purchased, any land in the area. Whatever might have been the situation if the relationship and course of conduct between the commission and redeveloper had been otherwise during these six and one-half years, the fact is, that at the time the Commission condemned petitioner's land, with a preference granted to this redeveloper, the Commission was acting in a discriminatory manner in derogation of petitioner's right to equal protection. To hold otherwise would be to give a commission the power to discriminate, without reasonable and just basis for classification, a power which it cannot have.

As petitioner's land has been taken in violation of its right to equal protection, petitioner has been deprived of property without due process of law under the 14th Amendment of the United States Constitution. Furthermore, while a taking for redevelopment can be for a public use, yet, in the instant case, in view of the circumstances and

course of conduct between the commission and the redeveloper, this taking for the purpose of benefiting the redeveloper can be deemed as in fact a taking for a private, rather than a public use. A public taking of private property for a private use is in violation of the due process clause of the 14th Amendment. *Missouri Pacific Railway Company* v. *Nebraska,* 164 U.S. 403.

The Supreme Court of Connecticut erred, when in granting judgment for defendant, it stated with reference to the aforesaid agreement of January 27, 1960, between the Redevelopment Commission of the City of Stamford, Connecticut, and F. D. Rich Co., Incorporated and Seon Pierre Bonan:

> "It is unnecessary to elaborate upon the details of the contract between the commission and the redeveloper which the plaintiff claims is illusory and void. It is sufficient to say that a lengthy instrument had been executed between the commission and Seon Pierre Bonan and the F. D. Rich Company, Inc. as redevelopers, which the commission asserts to be a valid and binding contract looking to the performance, by the redevelopers, of various preliminary obligations and the ultimate purchase, for redevelopment, of properties acquired by the commission."

It is not the Commission's assertion that the contract is valid and binding that is determinative of the issue, but rather whether, as a matter of law, the contract is valid and binding.

It should be noted that the trial court also would not meet the petitioner's claim that the contract was void.

Paragraph 6 of this agreement, the full text of which appears in Exhibit I. of Connecticut Supreme Court Record, reads as follows:

> "Upon submission of a Plan satisfactory to the Commission and such City officials and agencies as the Commission may indicate, the Redevelopers shall, within thirty (30) days of written notice from the Commission of approval of the Plan by all necessary local agencies and the Housing and Home Finance Agency enter into a contract to purchase from the Commission, after acquisition, demolition, and installation of those site improvements which are to be installed by the City, all the land in the area available to the Commission for sale for private development for cash at a price mutually agreeable to the parties hereto determined by sound appraisal practices, and approved by City agencies and officials and the Federal government, and in substantial accord with the conditions, restrictions, and limitations of a standard form of disposition contract as found in Federal Housing and Home Finance Agency Form H-6209 'Guide Form of Contract for Disposition of Land for Private Redevelopment' . . ."

The provision that a contract shall be entered into for cash "at a price mutually agreeable to the parties hereto determined by sound appraisal practices" makes the entire agreement patently void as illusory and indefinite. Restatement, Contracts § 32 (1932); Simpson, Handbook of the Law of Contracts, § 45 pages 69-71 (2d edition, St. Paul, 1965); 17 Am. Jur.2d, Contracts, § 26. Similarly, the provision with respect to entering into a contract "in substan-

tial accord with the conditions, restrictions, and limitations of a standard form of disposition contract as found in Federal Housing and Home Finance Agency Form H-6209 'Guide Form of Contract for Disposition of Land for Private Redevelopment' . . . ", also makes the entire agreement patently void as illusory and indefinite. Furthermore, this proposed contract was not in being at the time of the taking of the petitioner's property some six and one-half years later.

Since the Commission purported to act pursuant to this obviously illusory and void agreement for the very extended period of six and one-half years, it follows that they must be charged with knowledge and notice that this agreement was patently illusory and void.

Nevertheless, it is not necessary that they be charged with such knowledge and notice in order to find a deprivation of equal protection in this case. The court, in *Hobson* v. *Hobsen,* 269 F. Supp. 401, 497, stated:

> "Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of the Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."

In *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F.2d 920, 931, the court quoted from this statement in holding that the action of the redevelopment commission in that case could be a violation of equal protection.

B. Certiorari should be granted to decide whether it is a denial of substantive and procedural due process under the Fourteenth Amendment for a municipality to proceed to take title to real property and making improvements thereon while a suit is pending alleging the taking was for a private rather than a public purpose and in violation of the due process and equal protection clauses.

Section 8-129 of the Connecticut General Statutes provides, inter alia, that not less than twelve days nor more than ninety days after the Notice of Taking and Statement of Compensation have been served, and upon receipt of a Return of Notice filed by the agency, the Clerk of the Superior Court is authorized to issue a Certificate of Taking, and, upon the recording of such Certificate of Taking in the Town Clerk's Office, title to the property involved shall vest in fee simple in the municipality.

Under these circumstances, the property owner is remitted to an action in equity and is entitled to relief if he can sustain the burden of proving that the condemnation was one tainted by unreasonableness, bad faith or an abuse of the power confided to the condemnor or that the taking was for a private purpose or in violation of equal protection or due process.

The state court's denial of petitioner's request for an injunction restraining the vesting of title in the municipality deprived petitioner of an opportunity to test the lawfulness of the taking before title was taken from him, and thereby deprived him of the benefit of due process of law. The state court decision precluded the petitioner from effective resort to the only avenue of redress open to him on his claim that the taking was unlawful. Furthermore, it seems unreasonable that a citizen must hire counsel and petition

a court in a separate equity action in order to safeguard his property rights and title, rather than being afforded due process, to test the lawfulness of the taking, in the condemnation procedure itself.

Plaintiff recognizes that he is relegated to bringing an independent action to test the propriety of the condemnation. It is the plaintiff's position, however, that once the condemnee institutes an action to have a judicial review to discover if the taking was unreasonable, or in bad faith, or an abuse of the power conferred, or in violation of due process or equal protection, the "taking" should be stayed until this issue has been judicially determined. Inasmuch as the defendant city in this case was permitted to obtain fee simple title to the plaintiff's premises before such judicial determination, it is the petitioner's claim that the statute as applied by the defendant in this instance is unconstitutional and the "taking" illegal.

It is noteworthy that Connecticut General Statute Section 8-129 provides for a twelve-day waiting period between the date when the Commission files its Notice of Taking and Statement of Compensation (Lis Pendens) and the time when the Clerk of the Superior Court is authorized to issue a Certificate of Taking. Presumably, this twelve-day waiting period is afforded the property owner for the purpose of affording him time to commence an action for a full judicial review as to the correctness of the taking. The decision of the Supreme Court of the State of Connecticut in effect denies plaintiff this opportunity, necessarily implied by the provisions of the statute.

It is generally held that an actual or threatened illegal appropriation of or entry upon private land under color of

eminent domain, but without the institution of any proceedings to that end, will be restrained by a court of equity. *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155; *Utah Power and Light Co.* v. *United States,* 253 U.S. 389. The equitable jurisdiction in such cases is based upon the attempted misuse of the power delegated, and the inequality of the parties by reason of the grant of a prerogative right to one of them. *Henry Ford & Son* v. *Little Falls Fibre Co.,* 280 U.S. 369. A state does not have the power to authorize the taking of the property of an individual without his consent for the private use of another, even on the payment of full compensation. *Cole* v. *La Grange,* 113 U.S. 1; *Wilkinson* v. *Leland,* 2 Pet. (U.S.) 627. It is, therefore, now well settled that the prohibition against the taking of property for public use without just compensation, impliedly, but definitely, forbids the taking of property for private uses. *North Carolina Pub. Serv. Co.* v. *Southern Power Co.* (CA 4), 282 F. 837, cert. dismd. 263 U.S. 508. Condemnation for a non-public use is held to be a denial of due process, even though accompanied by full compensation to the owner. *Cincinnati* v. *Vester* (CA 6), 33 F.2d 342, affd. 281 U.S. 439; *Madisonville Traction Co.* v. *St. Bernard Min. Co.,* 196 U.S. 239.

The institution of a lawsuit seeking the remedy of injunction and alleging that the taking of plaintiff's property was for a private rather than a public purpose and in violation of due process and equal protection, should have stayed the taking by the defendant herein, pending the determination of the allegations of the complaint. Failure to afford plaintiff the opportunity to test this issue before title to his property is irrevocably lost, constitutes a taking without due process of law in contravention of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

JULIUS B. KURIANSKY
25 Bank Street
Stamford, Connecticut 06901
Attorney for Petitioner

April 2, 1970